

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

**STATE OF OKLAHOMA, ex rel.** )  
**W. A. DREW EDMONDSON, in his capacity as** )  
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**OKLAHOMA and OKLAHOMA SECRETARY** )  
**OF THE ENVIRONMENT C. MILES TOLBERT,** )  
**in his capacity as the TRUSTEE FOR NATURAL** )  
**RESOURCES FOR THE STATE OF OKLAHOMA,** )

**Plaintiff,** )

**vs.** )

**05-CV-0329 TCK-SAJ**

**TYSON FOODS, INC., TYSON POULTRY, INC.,** )  
**TYSON CHICKEN, INC., COBB-VANTRESS, INC.,** )  
**AVIAGEN, INC., CAL-MAINE FOODS, INC.,** )  
**CAL-MAINE FARMS, INC., CARGILL, INC.,** )  
**CARGILL TURKEY PRODUCTION, LLC,** )  
**GEORGE'S, INC., GEORGE'S FARMS, INC.,** )  
**PETERSON FARMS, INC., SIMMONS FOODS, INC.,** )  
**and WILLOW BROOK FOODS, INC.,** )

**Defendants.** )

**TYSON FOODS, INC., TYSON POULTRY, INC.,** )  
**TYSON CHICKEN, INC., COBB-VANTRESS, INC.,** )  
**GEORGE'S, INC., GEORGE'S FARMS, INC.,** )  
**PETERSON FARMS, INC., SIMMONS FOODS, INC.,** )  
**and WILLOW BROOK FOODS, INC.,** )

**Third Party Plaintiffs,** )

**vs.** )

**City of Tahlequah, *et al.*,** )

**Third Party Defendants** )

**DEFENDANT/THIRD PARTY PLAINTIFFS' MOTION FOR  
MISCELLANEOUS RELIEF – REQUEST FOR ESTABLISHMENT OF  
PROCEDURE FOR ENTRY OF CASE MANAGEMENT ORDER**

Defendants/Third Party Plaintiffs, Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., Cobb-Vantress, Inc., Cal-Maine Foods, Inc., Cal-Maine Farms, Inc., George's, Inc., George's Farms, Inc., Peterson Farms, Inc., Simmons Foods, Inc. and Willow Brook Foods, Inc. (hereinafter the "Defendants"), hereby submit their Motion for Miscellaneous Relief and specifically request that the Court establish a procedure and deadlines for actions to be taken by the parties in anticipation of a scheduling conference for the purpose of entering a Case Management Order, and set the date and time for such conference to permit the participation of the Third Party Defendants. Specifically, the Defendants request the Court enter an Order providing for the following:

- Set the date for the scheduling conference in this matter after June 30, 2006 to allow sufficient time for (1) the Third-Party Defendants to plead in response to the Third-Party Complaint; (2) the Defendants and Third-Party Defendants to conduct a Fed. R. Civ. P. 26(f) conference; and (3) the parties to confer as set forth below;
- Direct the parties to meet and confer for the purpose of establishing an Agreed Proposed Case Management Order; and
- In the event the parties cannot agree on a Proposed Case Management Order, direct the parties to submit their proposals for case management and a Proposed Order prior to the date set for the scheduling conference.

In support of the requested relief, the parties will show the Court:

### **PROCEDURAL HISTORY**

1. This action was commenced by the Plaintiffs' filing of their Original Complaint on June 13, 2005.

2. The Defendants filed their Third Party Complaint on October 4, 2005 [Dkt No. 80].

3. On January 9, 2006, Judge Ellison entered an Order, [Dkt No. 190], tolling the time for serving the Third-Party Complaint until such time as the Court ruled on the Defendants' Motion to Stay Proceedings, [Dkt No. 125], during the pendency of the proceedings in the United States Supreme Court initiated by the State of Arkansas.

4. On March 8, 2006, the Court granted Defendants' Motion to Withdraw their Motion to Stay Proceedings [Dkt. No. 223] in light of the Supreme Court's denial of the State of Arkansas' petition for original jurisdiction.

5. On March 20, 2006, the Court entered an Order extending the time by which the Defendants must serve the Third-Party Defendants until May 20, 2006 [Dkt No. 234].

6. On March 15, 2006, the Defendants began issuing Summons to the Third-Party Defendants, [Dkt No. 230], and commenced service of process.

7. By Order entered on March 24, 2006, [Dkt No. 238], Magistrate Judge Joyner directed the Plaintiffs and Defendants to hold a Rule 26(f) conference and submit their Joint Status Report by April 13, 2006. The parties complied [Dkt No. 372].

8. In the Joint Status Report, the Defendants asserted that "it will be premature to establish deadlines or to enter a Case Management Order until the Third Party Defendants have answered or otherwise pled in response to the Third Party Complaint." (Joint Status Rpt. at V.) Further, Defendants, with regard to their request for special case management, stated:

[G]iven the complexity of the issues, the geographic scope of the IRW, and the number of parties, including Third Parties, the Defendants request that once the Third Party Defendants have answered the Court hold a scheduling conference and enter a Case Management Order addressing the

needs of the parties and to provide for the orderly administration of the case.

(Joint Status Rpt. at XII.)

9. As of the time this Motion was filed, approximately 23 Third Party Defendants have answered the Third Party Complaint, and Defendants have agreed to extend the answer date for 72 Third Party Defendants to dates up to and including May 8, 2006. Upon motions, the Court has extended the answer date to May 18, 2006 for two Third Party Defendants [Dkt Nos. 391 and 392], and has extended the answer date to May 22, 2006 for two additional Third Party Defendants [Dkt Nos. 404 and 405]. Service of process still remains to be completed on some Third Party Defendants, which according to the Court's Order, must be completed by May 20, 2006. Allowing for the 20-day answer period, all of the Answers of the Third-Party Defendants identified in the original Third Party Complaint should be filed by June 9, 2006.

10. Defendants' counsel conferred with counsel for Plaintiffs with regard to the instant Motion, and are authorized to represent that Plaintiffs object to the requested relief.

### **ARGUMENT AND AUTHORITY**

It is now apparent from the Plaintiffs' First Amended Complaint, the Defendants' Answers and responsive Motions, and the Third Party Complaints, that the case initiated by the Plaintiffs involves complex factual and legal issues potentially encompassing natural forces and the operations of a multitude of persons, entities and industries spanning the entirety of the Illinois River Watershed (the "IRW"). The Plaintiffs assert that virtually all of the IRW has experienced some degree of impact, and that the alleged

injury to natural resources entitles them to traditional damage remedies, as well as equitable remedies, including environmental assessment and impact analysis, remediation, and potential mandatory and prohibitive injunctive relief related to agricultural operations. In response to Plaintiffs' allegations that the alleged natural resource damages stemmed, at least in part, from common and naturally occurring nutrients, Defendants exercised their right to identify and implead a cross section of third-parties who they believe conduct operations or operate facilities that cause or have the potential to cause the very same impact alleged by the Plaintiffs against Defendants. As such, the Defendants have sued approximately 161 sets of Third-Party Defendants who should be accountable for their operations contingent upon Plaintiffs sustaining their burden of proof and prevailing on their theories of joint and several liability. Although disagreeing with Defendants' right to assert third-party claims, Plaintiffs also recognize that a comprehensive Case Management Order will be required for the orderly administration of this case.

In addition to their multitude of other theories, Plaintiffs have asserted a claim for cost recovery under the Comprehensive Environmental Response, Compensation and Liability Act, ("CERCLA"), 42 U.S.C. 9607. The MANUAL FOR COMPLEX LITIGATION, FOURTH (2004) (hereinafter "MCL") is instructive as to the importance of case management in these wide-ranging, complex cases, to wit:

Early institution of an initial case-management order will help organize the case, provide a preliminary identification of legal and factual issues, and educate the court as to the potential size and complexity of the litigation.

*Id.* at § 34.21. The MCL recognizes that in such actions, although the plaintiff may only name a few initial Potentially Responsible Parties, the liability scheme under the statute,

including the availability of contribution actions under 42 U.S.C. 9613(f), encourages the PRPs to search out and join additional parties who may be liable to share in the response costs, thereby increasing the complexity of the case through scores of contribution and indemnity claims. *Id.* at § 34.2.

Typically, CERCLA litigation involves three distinct phases: “(1) liability; (2) determination of remedy and recoverable costs, including challenges to response actions for which costs were allegedly incurred; and (3) equitable allocation of any response costs among defendants.” *Id.* at § 34.12. In this case, additional phases may be implicated based upon the Plaintiffs’ implication that they may pursue preliminary injunctive relief. Thus, issues that should be addressed in the Case Management Order include:

- Should liaison or group counsel be designated;
- Will a separate phase for discovery and expert disclosures be required to address a request for preliminary injunctive relief;
- Should the case be bifurcated or trifurcated to address liability, remedies and damages;
- Management of discovery among the groups of Plaintiffs, Defendants and Third-Party Defendants;
- Alternative dispute resolution mechanisms and timing;
- Identification, disclosure and discovery of experts, which may differ between the phases of the litigation;
- Motion practice in the respective phases of the case; and
- Structure of jury versus non-jury elements of trial.

*See generally id.* at 34.21.

Defendants respectfully suggest to the Court that it will be most prudent and effective to conduct the scheduling conference and enter a Case Management Order with the representation and participation of the Third Party Defendants, which cannot occur until the time for pleading in response to the Third Party Complaint expires on June 9, 2006. If the Court holds a scheduling conference and enters a Case Management Order prior to this time, the process will need to be repeated in order to provide the Third Party Defendants an opportunity to be heard on case management issues, particularly those issues impacting potential requests for bifurcation and phasing of discovery. Setting a schedule for the development of a Case Management Order that addresses the need for the Third-Party Defendants to participate will not impair the progress of the litigation, nor will it prejudice Plaintiffs given their ability to proceed with written discovery. The primary parties have agreed to make the documents identified in their Initial Disclosures available for inspection on or before May 26, 2006. Thus, the Plaintiffs and Defendants will be consumed with preparing their own disclosures and reviewing the documents disclosed by their opponents certainly through June 2006, if not well into the fall. Additionally, all parties recognize that there is likely a significant volume of documents to be identified and produced from multiple state agencies in both Oklahoma and Arkansas, which will also consume considerable time and energy for all parties. Accordingly, given the volume of documents to be gathered, exchanged and evaluated, Plaintiffs, Defendants and the Third-Party Defendants who have answered thus far can continue to make progress in this case notwithstanding the fact that the entry of a Case Management Order may be delayed for a brief period.

Defendants suggest that it is within the Court's discretion afforded under Fed. R. Civ. P. 16, and in the best interests of justice to establish a procedure going forward that will result in a comprehensive Case Management Order that considers the views of all parties to the lawsuit. Accordingly, Defendants propose that the Court set a date for the scheduling conference on or after June 30, 2006. Further, the Defendants propose that the Defendants and Third Party Defendants be directed to conduct their Rule 26(f) conference and submit their supplemental Joint Status Report by June 23, 2006. Finally, the Defendants request that the Court direct the parties to meet and confer for the purpose of reaching an agreed Proposed Case Management Order once the Third Party Defendants have answered. In the event no agreement is reached, the Defendants request the Court to direct the parties who wish to submit their proposals for a Case Management Order do so no later than one week prior to the date set by the Court for the scheduling conference.

Respectfully submitted,

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